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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 914

GERALDINE SPINK,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

MYRA SPINK,
311 S. St. Clair Street,
Painesville, Ohio,
Attorney for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE 621-0547

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. _____.

GERALDINE SPINK,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio.

To the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Ohio entered in this cause on the 20th day October, 1965, dismissing the appeal of the Petitioner from a conviction under Ohio Revised Code 2901.25.

CITATIONS TO OPINIONS BELOW.

The Entry of the Painesville Municipal Court, Painesville, Ohio, is unreported and it is printed in Appendix, *infra,* page 19.

The Judgment Entry and the Opinion of the Court of Appeals of Ohio, Seventh Appellate District, Lake County, affirming the decision are unreported and are printed in Appendix, *infra,* pages 19-22.

The order of the Supreme Court of the State of Ohio dismissing the appeal October 20, 1965 is unreported and is printed in Appendix, *infra,* page 22.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A. 1257 (3) which section pertinently provides:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari * * * for any title, right, privilege or immunity especially set up or claimed under the Constitution."

This cause involves a violation of the Fifth and Fourteenth Amendments of the United States Constitution.

QUESTIONS PRESENTED.

1. Whether one in possession of property was denied the rights guaranteed by Section 1 of Article I of the Ohio Constitution and of the Fifth and Fourteenth Amendments of the Federal Constitution in that the trial court refused to recognize the widely accepted rule of law that one in possession has the right to protect his property against trespassers by acting promptly after giving due notice to leave and to use such force in the protection thereof as is reasonably necessary under the circumstances which is a defense to a charge of assault and battery.

2. Did the decision of the Supreme Court of Ohio so far sanction such a departure by a lower court from the accepted and usual course of judicial proceedings and from the Constitution as to call for an exercise of this Court's power of supervision in that corroborated and substantial testimony showed a reenforced complainant committed an organized invasion of the property of Petitioner, and yet the lower court approved this unlawful conduct by holding for the complainant.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

Ohio Revised Code, Section 2901.25. "Assault and Battery, and Menacing Threats. No person shall assault or threaten another in a menacing manner, or strike or wound another.

Whoever violates this section shall be fined not more than two hundred dollars or imprisoned not more than six months, or both."

Ohio Revised Code, Section 2909.21. "Trespassing Upon Lands or Premises of Another. No person shall enter without lawful authority upon the land or premises of another, or being upon the land or premises of another, upon being notified to depart therefrom by the owner or occupant, or the agent or servant of either, without lawful authority neglect or refuse to depart therefrom.

Whoever violates this section shall be fined not more than fifty dollars or imprisoned not more than thirty days, or both."

Article I, Section 1 of the Constitution of the State of Ohio. "Inalienable Rights. All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

Amendments to the Constitution of the United States:

Amendment V. "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in

any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment XIV, Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

During the summer, 1964, a water line survey was made, painting a center line in the road past complainant's property which adjoins Petitioner's land. On September 5, 1964, complainant's nephew knocked down a portion of the line fence and pushed dirt onto land owned, occupied, and in continuous possession of Petitioner's family since 1817. On the 16th of September, 1964, the Petitioner engaged in cleaning the stable heard a commotion at the line fence. With the fork still in hand and with her two poodles, Petitioner walked to the vicinity of the line fence. Complainant's nephew and brother were working a tractor. From a log the Petitioner watched the complainant's family gather. An armed, uniformed deputy sheriff and complainant's second brother entered Petitioner's land through the fence. Petitioner called to them to keep off. The brother instantly backed off the land. Running past the deputy the Petitioner faced the group at the opening in the line fence. Complainant rushed up to Petitioner. Petitioner with fork in hand told complainant to stay off the land. Complainant stepped onto the land, grabbed the tines and said she had had the land surveyed, it was hers, and she had a right to come onto the land. Still standing on Petitioner's land, from her right the deputy reached in front of Petitioner and held the handle of the fork. Deputy told complainant to let go, she stepped back onto her own property. Upon being asked by Petitioner to leave the land the deputy then did leave. Complainant dashed up to the deputy demanding he arrest the Petitioner. The deputy refused to make an arrest, stating there had been no assault. The complainant filed an affadavit of criminal assault and battery R. C. 2901.25 in the Painesville Municipal Court.

At the beginning of the trial over the objection of the Petitioner the Court admitted into evidence extensive testimony of complainant's surveyor in regard to the land and the property lines and then in his opinion failed to acknowledge that the one in possession has the right to protect his property. The Court also admitted into evidence the testimony of the deputy present, the only disinterested person, and then failed to give any weight to that testimony. The Court further failed to recognize the officer's decision not to make an arrest at the scene because no assault had been committed. Furthermore, the Court should have known proper procedure to regain possession or clear title is a civil suit.

REASONS FOR GRANTING WRIT.

1. **Whether one in possession of property was denied the rights guaranteed by Section 1 of Article I of the Ohio Constitution and of the Fifth and Fourteenth Amendments of the Federal Constitution in that the trial court refused to recognize the widely accepted rule of law that one in possession has the right to protect his property against trespassers by acting promptly after giving due notice to leave and to use such force in the protection thereof as is reasonably necessary under the circumstances which is a defense to a charge of assault and battery.**

As an incident to the right to acquire and own property, recognized by the laws of all civilized communities, the owner has the right to defend and protect it against aggression, and if he commits an assault in so doing, the law will justify him. As stated by the American Law Institute, an assault for the purpose of preventing or terminating another's intrusion upon the assailant's possession of land or chattels is privileged where such intrusion is either wrongful or made in such way as to cause the assailant to believe that it is wrongful, and he reasonably believes that the intrusion can be prevented or terminated only by the immediate infliction of the assault, *Am. Law Inst. Restatement, Torts* Sec. 77, provided the means he uses are reasonable, and provided further that he has first requested the other to desist from the intrusion or that the circumstances are such that a request of this kind may be dispensed with. 4 *Am. Jur.* 145, Sec. 35. The case of *Biggs v. Seufferlein*, 145 N. W. 507, says that one is not bound to stand by and submit to wrongful dispossession when he can stop it, and he is not guilty of assault. As stated in 4 *Am. Jur.* 161 Sec. 63, the means that may be

lawfully used in terminating an intrusion must be reasonable. While a man may use as much force as is necessary in the defense of his property, he may not inflict great bodily harm. *Scribner v. Veach*, 47 Am. Dec. 265. As stated in the testimony, 54 line 8, and 73 lines 20-23, the Petitioner committed no bodily harm whatsoever upon the complainant in the defense of the property:

"Q. Did any part of this fork pierce your clothing or pierce your body, yes or no?

A. (complainant) No.

Q. Were you required to have any medical attention for any injury?

A. (complainant) No."

"Q. (asked of complainant's brother) I ask, did she complain to you or did you with your vision observe her clothes or any part of her body penetrated or injured. Answer yes or no.

A. (complainant's brother) No."

Even though the Petitioner, alone, was facing seven persons and their machinery, she still exercised the highest degree of care that no one was hurt, no one touched, and no one felt a threat, 4 *West's Ohio Digest* 133 Sec. 67, 5 *O. Jur.* 104, from the farm fork she was carrying lawfully upon her own land in completing the farm duties she was lawfully entitled to perform. She had no intent of using it against the trespassers, and if they had not advanced and had not grabbed the Petitioner there would have been no touching by the fork. Any touching of the tool was the wrongful taking hold by the complainant herself (Bill of Exceptions, p. 34):

"Q. She grabbed the tines of the fork?

A. (Deputy Sheriff) At the base."

and by the deputy sheriff unlawfully, and while each of them had hold of the ends of the fork, the Petitioner

in the middle could not be held liable for any touching that took place at that time. Even though the Petitioner had the right to exercise self-defense, *Lewandowski v. Szymanski*, 7 O. L. Abs. 42, *State v. McLeod*, 82 O. App. 155, since the trespass by the complainant was accompanied by acts that amounted to assault upon the person of the owner, *Newcome v. Russell*, 117 S. W. 305, *Morgan v. Durfee*, 33 Am. Rep. 508, she did not exercise that right. After having accepted the boundary for nineteen years as owner, the fact that the complainant suddenly "mistakenly" believed that the land was hers does not affect the rule. In fact for 20 years prior to her ownership the complainant and her whole family had been employed by Petitioner's family on this property.

Complainant had to take note of the one in possession. 5 *O. Jur.* 116 Sec. 17 says that the privilege of employing force to regain possession of real property is not so broad as that of using force to protect such possession, 4 *Am. Jur.* 169 Sec. 80. It is commonly held that the use of force to regain possession of real property may not be justified solely on the ground of the actor's right to immediate possession.

The court itself states it was a civil case and yet when the decision was rendered, such evidence was ignored. The testimony and records show that the deputy at the scene said it was a civil case (Bill of Exceptions, p. 46):

> "A. (complainant) * * * he (referring to Deputy Miller) said it was a civil case."

and he refused to make an arrest for there had been no assault (Bill of Exceptions, p. 35 and p. 39, Cross examination and re-cross examination of the deputy sheriff):

> "Q. Did Miss Webster at that time request that you arrest Miss Spink?

A. Yes, I believe so.

Q. Did you arrest Miss Spink?

A. No.

Q. She made no threats, no verbal threats to assault anybody or to do anybody bodily injury, did she?

A. Not to my knowledge."

Ware v. Garvey, 139 F. Supp. 71.

The burden of proof is always on the state in a prosecution for assault, as in any other criminal prosecution, to establish beyond a reasonable doubt that the Petitioner committed the crime charged, and if the proof fails to establish any of the essential elements necessary to constitute a crime, the Petitioner is entitled to an acquittal. This results not only from the self-established principle that the presumption of innocence is to stand until it is overcome by proof, but also from the form of the issue in all criminal cases tried on the merits, which, being always a general denial of the crime charged, necessarily imposes on the government the burden of showing affirmatively the existence of every material fact or ingredient which the law requires in order to constitute an offense. 4 *Am. Jur.* 179, Sec. 100. The Petitioner was found guilty of the offense of assault and battery in violation of Revised Code, Section 2901.25, and yet the Opinion of the Court of Appeals says:

"* * * Since the court did not determine the question of a battery we conclude that he (like us) was unable to conclude beyond a reasonable doubt that defendant touched Mildred Webster with the fork first or that Mildred Webster reached out and grabbed the tines of the fork first."

The Petitioner denies that the state established beyond a reasonable doubt that the Petitioner committed illegal assault and battery. The complainant in her own

testimony admits that she was not injured in any way by the Petitioner, nor that she expected to be injured, and this was further set forth by witness Clifford Webster, brother. The complainant does not show that she was threatened by the Petitioner which put her in fear of being assaulted. (Bill of Exceptions, p. 57) (Questioning complainant):

"Q. In other words, you knew she would not touch you, otherwise you would have moved.

A. I did not think she would."

Therefore, the court erred in not dismissing the case, or in not finding the Petitioner not guilty. Moreover, the complainant admits entering upon the land in the possession of the Petitioner and then did bodily take hold of the tool in said Petitioner's hands. Petitioner denies committing assault and battery, the law recognizes one's right to protect his property against the trespasses of others, 4 *Am. Jur.* 159, Sec. 61, and to use such force in the protection thereof as is reasonably necessary under the circumstances. *Allison v. Fiscus,* 156 O. S. 120; *Lewandowski v. Szymanski,* 7 O. L. Abs. 42; *Esterly v. Goodman,* 7 O. L. Abs. 420. It is a widely recognized rule that a person in possession of property, either as owner, or as the agent, may justify a charge of assault and battery by showing the act complained of was to protect property from threatened and impending injury or destruction at the hands of the complainant. 25 *A. L. R.* 537. And yet with all this testimony of the complainant's own wrongful act of aggression and no proof of any illegal act by the Petitioner alone, for one is permitted to use a reasonable amount of force, the court found against the Petitioner.

This ruling of the court deprived the Petitioner of her right to protect her property as provided in the Fifth and Fourteenth Amendments of the Constitution of the United States, and Article I, Section 1 of the Ohio Constitution.

Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Operators of United States and Canada, 165 F. 2d 216.

2. **Did the decision of the Supreme Court of Ohio so far sanction such a departure by a lower court from the accepted and usual course of judicial proceedings and from the Constitution as to call for an exercise of this Court's power of supervision in that corroborated and substantial testimony showed a reenforced complainant committed an organized invasion of the property of Petitioner which the lower court approved by holding for the complainant.**

Petitioner was careful to obey the law. She never left the land that was in her possession and to which the family had had title since 1817. She obeyed the law to call to them to get off the land only when they stepped upon her property. She of course ran to them to keep them off if it was possible, although she was alone against five men and two women whom she felt were determined to take her land because of her experience on September 5th. The Petitioner touched none of the trespassers and if they had not trespassed and then grabbed her fork, there would have been no touching of any kind. Because their deed states so many feet "from the center of the road," they have taken advantage of this new survey putting the line on a pin point although surveyors who did it said it cannot be determined within a few feet. Their knocking down the fence on September 5th is the way they have acquired property in the past, for the brother has done that on another part of the farm and is now using as his own, as part of his driveway and as lawn, about thirty feet that does not belong to him.

The survey for the water line was by private sur-

veyors at government expense. Subsequently Petitioner paid $465.00 to the same surveyors to map Petitioner's property according to family deeds of record. The map made by these hired surveyors is incorrect and inconsistent with the deeds. This lack of conformity with the deeds would establish the center line a short distance from where it was painted, and along with the statement of the surveyors themselves, as well as the the same information obtained from county surveyors, that it is impossible to tell "within a few feet" where the center line is, shows that the painted center line chosen by the surveyors is wrong and leaves the complainant without grounds for her sudden claim of several feet of land over which there was never any doubt. For seven generations Petitioner's family called that fenced-in area the "Indian Grove," a camping ground for Indians traveling through the Connecticut Western Reserve. In late years Petitioner's uncle used it as night pasture. The adjoining acre now occupied by complainant was acquired from Petitioner's uncle. The boundary between the "Indian Grove" and the acre was never altered. There has never been any act or conversation between the complainant and the Petitioner in regard to this line fence until September 5th, 1964 when the complainant's nephew was knocking it down.

The Court permitted evidence at great length from complainant's surveyor not a witness to the complaint, and from all other witnesses in the case, as to the line fence and possession of the property; yet in his decision he stated that he was concerned only with the charge of assault and battery (Bill of Exceptions, p. 124):

> "The Court: In the case before us today we are concerned only with the charge in that Geraldine Spink did unlawfully commit an assault and battery, under Section 2901.25, Revised Code of Ohio."

The court forgot the crux of the matter. This case was not an ordinary assault and battery—a dancehall brawl, an assault and battery on main street, or an assault in some dark alley. This case was different. The Petitioner exercised a legal right, granted her by the Constitution—the right to protect her property. It was a case of one in lawful possession of property, protecting her land from the wrongful taking by force by the complainant and complainant's family—their plans so surreptitiously arranged that the law escaped its true and rightful place in the case. *Bradshaw v. Ashley,* 180 U. S. 59, 141 *A. L. R.* 276, so ably sums up a long discussion when it says

> "while one who is rightfully in possession may defend that possession by the use of all necessary force, one who is out of possession though entitled thereto, may not, taking the law into his own hands, recover it by force."

The Petitioner avers that she acted as any reasonable, ordinary prudent man would have in similar circumstances. The Petitioner maintains that she is not guilty of assault and battery as so found by the court.

The higher courts have affirmed the lower court's decision which makes the law in Ohio now to be that anyone may go upon the lands of another. If this is permitted to stand, this case will change the law of Ohio so that there is no such thing as "trespass." We cannot substitute expediency for justice and truth. We feel it important to ask this Court to consider the case. "The justice rendered by the Supreme Court is justice according to law"—Dean Griswold.

The right of the Petitioner to eject a trespasser is good. 5 *O. Jur.* 2d 118, Sec. 18. Also while one is in possession of property he may defend it against aggression by another without being liable for assault and battery. 5 *O.*

Jur. 2d 118, Sec. 19. In the testimony, it is shown several times that the complainant, and others with her, did enter upon land in the possession of the Petitioner. Ohio Revised Code, Sec. 2909.21:

> "No person shall enter without lawful authority upon the land or premises of another, or being upon the land or premises of another, upon being notified to depart therefrom by the owner or occupant, or the agent or servant of either, without lawful authority neglect or refuse to depart therefrom."

The complainant upon being told by her surveyor that her deed showed that her stakes should be a few feet farther north, looked at one stake only, took the law into her own hands, and in three hours organized her family, their tractor, tools and weapons, called a deputy sheriff and attempted to take the land by force, without resorting to a civil action to quiet title. The complainant thereby did commit unlawful trespass on the land of the Petitioner.

The Petitioner may act promptly and use such force in the protection of his property as may be reasonably necessary under the circumstances, and for such force he is not liable either criminally or civilly. *Allison v. Fiscus,* 156 O. S. 120; *Lewandowski v. Szymanski,* 7 O. L. Abs. 42; *Esterly v. Goodman,* 7 O. L. Abs. 420; *Darling v. Williams,* 35 O. S. 58. This right is most frequently exercised to protect land from intrusion. The fact that intruder mistakenly believes that he has the right or privilege to intrude does not affect the rule stated, unless the Petitioner intentionally or negligently caused such mistake. *Am. Law Inst. Restatement, Torts,* Sec. 77, 4 *Am. Jur.* 159, Sec. 61. This does not mean that one can take the settlement of conflicting claims into his own hands. *Biggs v. Seufferlein,* 145 N. W. 507. Where one not in possession of land forcibly enters thereon and ejects the one in possession, he

is criminally liable for the assault. *Hickey v. U. S.*, 168 F. 536, 4 *Am. Jur.* Sec. 78, Assault and Battery. If a trespasser goes on property with the intent and with the means to commit an assault or a felony, if necessary to accomplish the end intended, the owner of the property may repel force by force. *Shain v. Markham*, 20 Am. Dec. 232, 25 *A. L. R.* 545, 32 *A. L. R.* 1541, 34 *A. L. R.* 1498, 4 *Am. Jur.* 163 Sec. 64.

There was no evidence that the trespasser ever had possession, nor do they claim to have ever had possession. The trial court and the Court of Appeals held that, as neighbors, the Petitioner was too harsh. In the opinion of the Court of Appeals "* * * nor was there need for this conduct on the part of defendant to protect her mother's property. Mrs. Webster was not a stranger and this incident occurred out in the open, during the daylight between next door neighbors." Why blame the Petitioner any more than the trespasser? This was not the type of trespass where a person wanders upon the land of another. This was a deliberate invasion. The trespasser knew where the line was, who had the land, that the owner was present, yet, without asking permission to inspect the survey stakes, she entered upon the land of another with six adults right behind her.

The Petitioner by herself did well to stop this persistent attack on her property without anyone's getting hurt. All witnesses agreed all the trouble took place on the Petitioner's side of the fence, yet lower courts did not accept this evidence in their decisions as a defense.

The prosecutor's claim in his reply brief to the Court of Appeals that a survey alone changes title and possession to land is clearly out of order. His claim is repugnant to the Constitution of the United States. One cannot be deprived of his property without due process of law. *Sup. Ct.*

Digest, Constitutional Law Sec. 529c, *Sexton v. Barry*, 233 F. 2d 220.

At the end of the hearing before the Ohio Supreme Court upon motion to certify the record, His Honor, Chief Justice Taft, leaned forward and asked the assistant prosecutor if he thought the court should hear the case. Answer—"No, I do not." The Chief Justice sat back in his chair. The decision had been made for the court. Canons of Professional Ethics adopted by The American Bar Association No. 15: "It is improper for a lawyer to assert in argument his personal belief * * *." The case had been appealed to seek the opinion of the Supreme Court of Ohio. The opinion of the prosecutor already was known. The fundamental concept of "due process of law" is that parties to controversies are entitled to have them determined by an impartial tribunal. *Lee v. Fleming*, 331 U. S. 805. The prosecutor misleads each court with statements that did not take place. Before the Ohio Supreme Court the new statement was: "complainant was just walking along her northern boundary."

It came out in the trial why the Petitioner had a fork. Yet lower courts make a great deal of the fork, and the prosecutor has changed his facts in his briefs in regard to the fork. It was not an inherently dangerous weapon. It is known that the fork is the farmer's tool as the law book is the lawyer's tool. Even the well-known TV program "Green Acres" recognizes the fork as the symbol of the farmer. The courts are blaming Petitioner for her ownership of the fork rather than which of the four in possession misused it. Furthermore the courts made much of the Petitioner's evicting only the complaining trespasser. The courts failed to consider the testimony of the witnesses. The evidence showed three people entered upon the land of the Petitioner. They were all ordered off, as the law

recommends. The third person, the brother of the complainant, moved off the land when ordered. As soon as it was ascertained that the deputy was illegally on the land he was ordered off and he left. Therefore from the evidence it shows only one trespasser needed to be evicted and was. The lower courts do not hold that there was a battery. A stubborn and determined trespasser who refused to leave is bluffed off the property without even being threatened or touched yet the courts criticized the eviction as "charging with too much force." The courts erred in not considering all the facts in the case and the proper interpretation of the law as it applies to the facts.

CONCLUSION.

The Petitioner seeks to correct the infringement of her constitutional rights afforded her by the Ohio Constitution Article I, Section 1, and by the Constitution of the United States in the Fifth and Fourteenth Amendments which grant her the right "to protect property." This right to protect property has been denied her by the Courts of Ohio by finding her guilty of criminal assault and battery. She also seeks this Court's power of supervision to have applied to this case the law as set forth in previous cases and by the Constitution, from which the Ohio courts have so far deviated. The right of property is a fundamental and inherent right granted to us by our forefathers. The Constitution gives us the right to protect it. The Petitioner now seeks from you that protection afforded by the Constitution.

For the reasons set forth herein, it is contended that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MYRA SPINK,

Attorney for Petitioner.

APPENDIX.

ENTRY OF THE MUNICIPAL COURT.

Part of the Transcript of the Painesville Municipal Court:

10-9-64. Defendant in Court. Trial held. Finding: Guilty: Fine $100.00 and costs, $50.00 suspended.

J. MELVIN ANDREWS,
Acting Judge.

JUDGMENT ENTRY OF THE COURT OF APPEALS.

COURT OF APPEALS OF OHIO
SEVENTH APPELLATE DISTRICT
Mahoning County Courthouse
Youngstown, Ohio 44503

April 2, 1965

Mr. Guy J. McDermott,
Clerk of Courts,
Lake County Courthouse,
Painesville, Ohio.

Re: State of Ohio, Plaintiff-Appellee, v. Geraldine Spink, Defendant-Appellant. Case No. 767

To the Clerk of Courts:

By direction of the Court you are hereby authorized to and please will enter on the docket (not journal) of the Court of Appeals the decision of this Court in the above captioned case as evidenced by the following entry:

"April 3, 1965. Judgment affirmed. Exceptions. See memorandum opinion."

Yours very truly,

NILS P. JOHNSON,
GEORGE M. JONES,
JOHN J. LYNCH,
Judges.

Please Note:

Journal entry must be furnished immediately by prevailing counsel.

c/c Fred V. Skok,
Prosecuting Attorney,
Lake County Courthouse,
Painesville, Ohio.

Roland Spink,
Geraldine Spink,
311 S. St. Clair St.,
Painesville, Ohio.

OPINION OF THE COURT OF APPEALS.

JONES, *J.*

On the ninth day of October, 1964, the defendant was found guilty, by the acting Municipal Judge of Painesville, Ohio, of the offense of assault and battery in violation of Revised Code, Section 2901.25. Appeal from the judgment entry was timely filed in this Court and has been heard upon the transcript, bill of exceptions, assignments of errors, briefs and oral argument of counsel.

On the seventeenth day of September Mildred Webster signed, in the Painesville Municipal Court, a war-

rant to arrest defendant affirming that defendant committed an assault and battery upon her in violation of Revised Code, Section 2901.25. The testimony showed that on the previous day (September 16, 1964) there had been an incident between these two people and others that occurred on land claimed by both parties. The parties are, and have been, neighbors for years. A recent boundary dispute caused the two to meet at the property line. Defendant claimed to be upon her mother's land and Mildred Webster claimed to be standing upon her land when contact was made between them. Defendant held a pitchfork in her hands. The area of dispute, according to the testimony, is simply: Did defendant thrust the fork at Mildred Webster and cause the tines of the fork to come into contact with Mildred or did Mildred grab the tines thus causing the contact between the tines and herself? The lower court found that the defendant threatened Mildred Webster in a menacing manner and found defendant guilty. (Bill of Exceptions page 126.) Since the court did not determine the question of a battery we conclude that he (like us) was unable to conclude beyond a reasonable doubt that defendant touched Mildred Webster with the fork first or that Mildred Webster reached out and grabbed the tines of the fork first.

The leveling of a pitchfork, tines forward, at another certainly is a "menacing act" to say the least, but the question remains: Was it justified by provocation or to protect property in a reasonable manner with reasonable force? We conclude that defendant felt that the incident occurred on her mother's land just as Mildred Webster thought that the incident occurred on her land. Actual ownership of the land is immaterial. In this case there was not such provocation displayed as would warrant the "charge" upon the person of Mildred Webster by defend-

ant at full speed with leveled pitchfork; nor was there need for this conduct on the part of defendant to protect her mother's property. Mrs. Webster was not a stranger and this incident occurred out in the open, during the daylight between next door neighbors.

We find sufficient proof of each element of the charge to support the finding. The assignments of error are not well taken and the judgment of the trial court is affirmed.

APPROVED:
GEORGE M. JONES,
Judge.

JOHNSON, *P.J.*, concurs.
LYNCH, *J.*, concurs.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL.

(Filed October 20, 1965.)

This cause, here on appeal as of right from the Court of Appeals for Lake County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant costs herein expended; that a mandate be sent to the Painesville Municipal Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lake County for entry.